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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

- - -

HONORABLE MANUEL L. REAL, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	NO. CV 90-3122-R
	)	
vs.	)	
	)	
MONTROSE CHEMICAL CORPORATION	)	
OF CALIFORNIA, et al.,	)	
	)	
Defendants.	)	
<hr/>		
AND RELATED COUNTERCLAIMS,	)	
CROSS-CLAIMS AND THIRD-PARTY	)	
ACTIONS	)	
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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Los Angeles, California  
Monday, October 2, 2000

COPY

LEONORE A. LeBLANC, CSR  
Official Reporter  
455 United States Courthouse  
312 North Spring Street  
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25

I N D E X

2	<u>PROCEEDINGS</u>	<u>Page</u>
3	Plaintiffs' motion in limine to exclude and/or	
4	limit the testimony of Dale Jensen:	
5	By Mr. Galvani.....	7
6	Ruling of the Court.....	7, 8
7	Plaintiffs' motion in limine for admission of	
8	summaries and for a ruling on the	
9	admissibility of the underlying documents:	
10	By Mr. McNulty.....	8
11	Plaintiffs' motion to exclude defendants'	
12	witnesses (Spaulding, Inman, Cicchetti,	
13	Hausman, Knezovich, Davis, Hansen and Giesy):	
14	By Mr. Galvani.....	8
15	By Ms. Hurley.....	12
16	Ruling of the Court.....	13
17	Plaintiffs' motion to strike defendants' witnesses	
18	(Whysner, Butler and Henderson):	
19	Ruling of the Court.....	13
20	Plaintiffs' motion for partial summary judgment on	
21	the issue of injury to natural resources (birds):	
22	Ruling of the Court.....	14
23	Plaintiffs' motion for separate trial of amounts of	
24	certain contractor costs:	
25	By Mr. Lytz.....	14, 15, 16
	By Mr. O'Rourke.....	14, 16
	Ruling of the Court.....	17

I N D E X (Continued)PROCEEDINGSPage

Plaintiffs' motion to strike defense witnesses  
Bachman, Hargis and Dean:

Ruling of the Court..... 16

Defendants' motion to exclude evidence related to  
(1) ocean dumping and (2) LACSD data from  
1969-1975:

By Mr. Spector..... 16

By Mr. Lytz..... 18

Ruling of the Court..... 18

1 LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 2, 2000; 10:00 AM

2 (Proceedings in unrelated matters heard.)

3 THE CLERK: Item Number 10, CV 90-3122, United  
4 States of America, et al. vs. Montrose Chemical, etc.,  
5 et al.

6 Counsel, your appearances, please.

7 MR. McNULTY: Good morning. Michael McNulty for  
8 plaintiff United States.

9 MS. HURLEY: Good morning, your Honor. Ann Hurley  
10 for plaintiff United States.

11 MR. MUELLER. Good morning, your Honor. Jon  
12 Mueller for the United States.

13 MR. O'ROURKE: Steven O'Rourke also for the United  
14 States.

15 MR. SPECTOR: Good morning. Jeffrey Spector for  
16 the United States.

17 MR. SAURENMAN: Good morning, your Honor. John  
18 Saurenman for the State of California.

19 MR. GALVANI: Your Honor, good morning. Paul  
20 Galvani of Ropes & Gray for the defendants Aventis  
21 CropScience and Atkemis Thirty-Seven.

22 MR. LERMAN: Good morning, your Honor. Cary  
23 Lerman of Munger, Tolles & Olson for Aventis CropScience USA  
24 Inc. and Atkemis Thirty-Seven.

25 MR. LYTZ: Good morning, your Honor. Karl Lytz on

1     behalf of Montrose Chemical Corporation of California.

2             MR. SIMSHAUSER: Good morning, your Honor. Peter  
3     Simshauser for Chris-Craft.

4             THE COURT: All right. Counsel have anything to  
5     add to the documents which have been filed on number 1,  
6     which is the plaintiffs' motion in limine to exclude or  
7     limit the testimony of Dale Jensen?

8             MR. McNULTY: Nothing more for plaintiffs, your  
9     Honor.

10            MR. GALVANI: Nothing from the defendants, your  
11     Honor.

12            THE COURT: That motion is granted.

13            MR. GALVANI: Your Honor, could I just -- with  
14     respect to that, the proposed order has two different  
15     options. One sought to exclude Mr. Jensen altogether, and  
16     the other sought to exclude so much of his testimony as  
17     related to his opinion on documentation.

18            In their moving papers the plaintiffs specifically  
19     say they do not dispute the right of Mr. Jensen to challenge  
20     mistakes and errors, and so on, that have been made by the  
21     plaintiff.

22            So I would urge your Honor not to grant the first  
23     paragraph of the order that the plaintiffs have submitted to  
24     the Court, because their cost data remain rife with errors  
25     and failures to withdraw stricken costs and the like, and

1 that I don't think should be subject of this ruling.

2 THE COURT: Well, that's subject to  
3 cross-examination, in any event.

4 All right. Plaintiffs' motion in limine for  
5 admission of summaries and for a ruling on the admissibility  
6 of the underlying documents. Anything to add to that?

7 MR. McNULTY: Your Honor, I believe we've reached  
8 a stipulation with respect to that issue, and we'll be  
9 submitting that to you.

10 THE COURT: All right.

11 Plaintiffs' motion to exclude defendants'  
12 witnesses Spaulding, Inman, Cicchetti, Hausman, Knezovich,  
13 Davis, Hansen and Giesy. Anything to add to that motion?

14 MR. GALVANI: Yes, your Honor. Paul Galvani for  
15 the defendants again.

16 The Government in this case has clearly raised new  
17 matter in their reply brief which we have not had a chance  
18 to address. Specifically in the case of Dr. Spaulding, they  
19 raise for the first time an attack on his qualifications.  
20 Now, that issue has been separately raised by the State of  
21 California in an objection they filed to his testimony,  
22 which we were addressing in that context, but we have not  
23 had an opportunity to respond to this new assertion in the  
24 reply papers about Mr. Spaulding's qualifications. And,  
25 indeed, we can demonstrate readily that he is qualified to



1 give the sort of opinions that are included in that report.

2 THE COURT: Mr. Galvani, now is the time.

3 MR. GALVANI: Your Honor, I have his curriculum  
4 vitae which I'd like to hand up, if I may.

5 (Pause.)

6 Your Honor, this is Exhibit 15011. Your Honor  
7 will see under the Qualifications paragraph, the second  
8 sentence says, "He specializes in numerical modeling of  
9 nearshore and coastal processes of estuarine, coastal and  
10 continental shelf regions to include hydrodynamics, waves,  
11 sediment transport and pollutant transport, fate and  
12 effect," and so on.

13 Dr. Spaulding's basic expertise is in the  
14 conservation of mass and how it moves in the environment,  
15 and that's what he has done here. He has analyzed, from  
16 years of data that were developed by the State of  
17 California, including county commissioners and the county  
18 data, all the data that were available, he has assembled and  
19 analyzed, and that was input into his model, and he is  
20 qualified to do that.

21 Now, interestingly, the Government's -- what the  
22 Government is attempting to do here, your Honor, with this  
23 motion is to keep out of the trial evidence having to do  
24 with all the agricultural inputs, the other sources of DDT  
25 into the Southern California Bight, which our experts say

1 that is the cause of any difficulties being suffered by the  
2 birds on the Channel Islands.

3 And, in that connection, your Honor, the  
4 plaintiffs, although they now assert that there is no  
5 evidence to support Dr. Spaulding's analysis, in fact they  
6 have included as one of their exhibits a report prepared in  
7 1973 by the Southern California Coastal Water Research  
8 Project -- it's the plaintiffs' Exhibit 3335. And I have  
9 that, and at page --

10 THE COURT: That's all in your papers.

11 MR. GALVANI: Well, this is new, your Honor. This  
12 is not -- We didn't cite this particular document in our  
13 papers.

14 But this document reflects that 200 metric tons a  
15 year of DDT were entering the Southern California Bight  
16 carried on the California current.

17 And, similarly, Dr. Eganhouse, whom who they have  
18 identified as an expert witness on their behalf -- we  
19 challenge him -- but he refers to an article, the chapter  
20 that he wrote in a book with Indira Venkatesan, and in that  
21 book, which likewise was marked as an exhibit at his  
22 deposition, they concluded 250 to 570 tons a year of DDT  
23 were advecting into the Southern California Bight.

24 So my point is, your Honor, that there is  
25 significant evidence from the plaintiffs themselves, their

1 own witnesses, that support the analysis that has been  
2 performed by Dr. Spaulding and Dr. Inman. And the  
3 plaintiffs' attack, your Honor, as unfounded and contrary to  
4 evidence and unsupported by evidence is simply beside the  
5 point, because there is ample evidence that in fact  
6 corroborates that analysis.

7 Now, briefly, if I may also add with respect to  
8 Mr. Knezovich, they argued initially Dr. Knezovich's  
9 fingerprint argument that you could analyze the ratio of DDT  
10 to PCB's, and that would be of assistance in determining the  
11 source of DDT being found in the birds.

12 Their initial argument was that we had absolutely  
13 no support for this theory; this is the first time this  
14 theory has ever been attempted. And then shortly after that  
15 we found an e-mail -- we were sent an e-mail that a NOAA  
16 representative from the Damage Assessment Center had sent  
17 out saying that, indeed, this theory does work.

18 So now the plaintiffs have come back and changed  
19 their approach, after having represented to you, your Honor,  
20 that there was no such approach ever tried before, they've  
21 come back and said, "Well, we never meant to say that. What  
22 we have said is that it wasn't done properly in this case."

23 Your Honor, we submit that all of their  
24 assertions, including with respect to Dr. Davis as well, who  
25 testifies about, from twenty-five years' experience, about

1 agricultural runoff and how it affects animals, all of their  
2 challenges, your Honor, go to the weight of the evidence at  
3 most. And these are matters that the Court can rule on in  
4 due course when the evidence is offered and  
5 cross-examination. As your Honor said with respect to  
6 Jensen, these issues are for cross-examination.

7 Thank you.

8 MS. HURLEY: Your Honor, if I may just briefly.

9 I think that the plaintiffs' position is  
10 adequately set forth in our papers with respect to the  
11 science, but I would like to just emphasize for the Court  
12 that the issue here isn't whether there is or is not  
13 evidence of agricultural runoff. The issue is whether the  
14 particular experts, so-called experts, in question  
15 adequately used science to demonstrate this. And our  
16 position with regard to Dr. Spaulding, one, is that he does  
17 not have the background to do the kind of modeling that he  
18 did. It's not the same thing to model agricultural  
19 application as it is to model dead bodies in the ocean.  
20 And, in addition, we believe that because of the total lack  
21 of adequate data he could not possibly use the kind of  
22 modeling that he did.

23 Again, with regard to Dr. Knezovich, plaintiffs  
24 never said that the use of ratios was something that had  
25 never been done in the literature. Clearly it's been done

1 in the literature. In fact, some of plaintiffs' own experts  
2 have done a similar thing. What they objected to was the  
3 fact that Dr. Knezovich's approach to this, and in fact what  
4 the defendants keep calling fingerprinting for agricultural  
5 runoff, just is totally improper as a matter of science, and  
6 I believe we've set that out in our papers.

7 THE COURT: Yes, you did.

8 Anything further?

9 All right. That motion is granted, except as to  
10 paragraphs 5 and 13 and 19 of Dr. Davis' report. All others  
11 granted.

12 Plaintiffs' motion to strike defendants'  
13 witnesses. Anything to add to those documents?

14 MR. O'ROURKE: Nothing for the plaintiffs, sir.

15 MR. GALVANI: Nothing from the defendants, your  
16 Honor.

17 THE COURT: All right. The motion is granted as  
18 to Whynter; denied as to Butler and Henderson.

19 Plaintiffs' motion for partial summary judgment on  
20 the issue of injury to natural resources, that is to the  
21 birds. Anything to add to that?

22 MR. MUELLER: Nothing for United States, your  
23 Honor.

24 MR. SIMSHAUSER: Nothing for defendants, your  
25 Honor.

1 THE COURT: All right. That motion is granted.

2 Plaintiffs' motion for separate trial of amounts  
3 of certain contractor costs. Anything to add to the  
4 documents which have been filed?

5 MR. McNULTY: Nothing for the United States, your  
6 Honor.

7 MR. LYTZ: Your Honor, Karl Lytz on behalf of  
8 defendants.

9 We believe this motion is moot as a result of the  
10 Court's rulings on September 18th. The two contractors at  
11 issue, ECC and ICF/Kaiser were both involved in the 204th  
12 Street excavation. Your Honor may recall having granted our  
13 motion for summary judgment on that issue at our last  
14 hearing.

15 Similarly, to the extent that these contractors  
16 were involved in any other areas in the neighborhood, the  
17 Court also concluded at our last hearing that plaintiffs had  
18 failed to demonstrate liability on behalf of the defendants  
19 for those costs.

20 I have copies of both of those orders available,  
21 your Honor, if you'd like to review them.

22 THE COURT: No.

23 MR. O'ROURKE: Judge, we already segregated out  
24 the 204th Street costs for these two contractors at issue,  
25 so Mr. Lytz' first point was correct and not relevant,

1 because we had already deducted those.

2 His second point that the rest of the costs  
3 related to response actions that took place in the  
4 neighborhood, we had moved for summary judgment a couple of  
5 years ago. One of the first things that you did, when you  
6 took this case over, was grant summary judgment for the  
7 onshore areas. Issues of whether liability in the storm  
8 water runoff pathway and in the neighborhoods was fully  
9 briefed at that time. Summary judgment was granted in our  
10 favor.

11 Recently, in opposing the 204th Street stuff, the  
12 defendants put in an argument about the neighborhood, and  
13 you did sign an order that said we had failed to prove -- to  
14 carry our burden on summary judgment of liability for the  
15 neighborhoods.

16 So there's a conflict between the two orders, but,  
17 at worst, what it says is there's still a factual dispute  
18 about this scope of liability. We think we won the first  
19 time; they think the second time we failed to carry our  
20 burden on summary judgment. It may create a triable issue,  
21 but our position is that you've already ruled on this on  
22 April 24th, and they're just trying to re-litigate the issue  
23 of liability.

24 MR. LYTZ: Your Honor, counsel on the latter point  
25 fails to draw to the Court's attention a stipulated order

1 entered on December 12th, 1997, that concerned the scope of  
2 the summary judgment motion on which they're claiming that  
3 this decision has already been decided.

4 Specifically, we had entered into a stipulation  
5 prior to that summary judgment motion which provides as  
6 follows: The motion for partial summary judgment does not  
7 seek to resolve the issue of liability relating to the  
8 following geographic areas. The subsection B says the soils  
9 contained in the neighborhood located at 204th Street, and  
10 so forth.

11 I have a copy of that order available, if the  
12 Court would like to review it.

13 MR. O'ROURKE: Your Honor, if I can just briefly  
14 reply on this order.

15 The defendants -- When we moved for summary  
16 judgment the first time a couple years ago, the defendants  
17 asked us to sign a stipulation which specifically said the  
18 summary judgment did not include the storm water pathway.  
19 We refused to sign that order, and, instead, we signed an  
20 order saying it did not include this 204th Street issue.

21 So this stipulation is completely consistent with  
22 what I was just saying. There's a difference between the  
23 excavated fill areas on 204th Street and the storm water  
24 runoff pathway that runs through the neighborhoods.

25 MR. LYTZ: Your Honor, at the time this was --



1 this stipulation was entered into, the plaintiffs had not  
2 even amended the complaint yet to include the neighborhood  
3 areas other than the storm water pathway as being the area at  
4 issue.

5 THE COURT: Those matters can be separated at  
6 trial. The motion is denied.

7 Plaintiffs' motion to strike defenses witnesses  
8 F. Bachman, D. Hargis and B. Dean. Anything to add to the  
9 documents which have been filed?

10 MR. O'ROURKE: The plaintiffs have nothing to add,  
11 sir.

12 MR. LYTZ: Nothing to add for defendants, your  
13 Honor.

14 THE COURT: The motion is granted in its entirety  
15 as to Bachman; paragraphs 54 and 82 of the Hargis testimony;  
16 paragraphs 15, 18 and 21 to 29 of Dean's testimony; Trial  
17 Exhibit 6206; and Trial Exhibit 6221.

18 Defendants' motion to exclude evidence related to  
19 ocean dumping and the LACSD data from '69 to '75. Counsel  
20 have anything to add to those documents?

21 MR. LYTZ: Nothing for defendants, your Honor.

22 MR. SPECTOR: Jeffrey Spector for the United  
23 States.

24 Your Honor, we have two brief points regarding  
25 issues raised in the defendants' reply brief. The first

1 point relates to the ocean dumping evidence.

2 Defendants' reply consists -- one-third of  
3 defendants' reply relates to an argument that the ocean  
4 dumping evidence is not relevant to Count Two, the response  
5 costs for the Palos Verdes Shelf. This is a quintessential  
6 strawman. Plaintiffs have never argued that ocean dumping  
7 evidence is relevant to Count Two. Rather, we have  
8 consistently argued that evidence of ocean dumping is  
9 relevant to Count One, the natural resources damage claim.  
10 And at trial we shall show that Montrose dumped several  
11 hundred tons of DDT at dump site 2 off the coast of Catalina  
12 Island, and that such DDT is a source for the damages to the  
13 natural resources of the Southern California Bight,  
14 specifically the bald eagles of Catalina Island.

15 Ocean dumping evidence is relevant to Count One.  
16 What is not relevant is defendants' arguments regarding  
17 Count Two.

18 Our second point relates to the LACSD monitoring  
19 data. This data reflects LACSD's efforts in the early  
20 1970's to monitor the DDT content of the sewer waste, both  
21 above and below the Montrose plant. Defendants in their  
22 reply brief argue that such data is irrelevant and cannot --  
23 as plaintiffs cannot corroborate that the data, specifically  
24 the data relating to March of 1970, was representative of  
25 the Montrose wastestream. This is simply incorrect.

1           Indeed, some of the most persuasive evidence comes  
2 from Montrose's own vice president of operations, a  
3 Mr. A.R. Wilcox, who stated that the LACSD monitoring data  
4 corresponded closely with Montrose's own data.

5           We've provided additional corroborating evidence  
6 in our opposition brief. Moreover, we continue to assert  
7 that defendants' arguments not go to the relevance of the  
8 LACSD data, but simply as to what weight this Court should  
9 provide to that.

10           MR. LYTZ: Your Honor, Mr. Wilcox's testimony did  
11 not relate to the sampling on March 30th of 1970, which is  
12 at issue. It related to sampling conducted by the LACSD at  
13 a much later period in time.

14           THE COURT: That motion is denied.

15           All right, I have -- it's not on the calendar, I  
16 don't think, but I have some motions in limine which I will  
17 rule on later. All right, that takes care of the matters on  
18 calendar today.

19           As you prepare for trial, all testimony of the  
20 witnesses shall be done by declaration setting forth not  
21 only the expertise of the witness but their opinions and/or  
22 testimony which shall then be subject to cross-examination  
23 by the other side. All witnesses.

24           MR. McNULTY: Excuse me, your Honor. In a prior  
25 order we had agreed among ourselves and put in an order that

1 you signed that for fact witnesses we would have up to  
2 twenty minutes to introduce the witness to the Court and  
3 highlight any particular elements of testimony and up to  
4 forty minutes for experts. Does that stand?

5 THE COURT: No, I have to re-think that whole  
6 thing. I'm working on that now. I want the testimony of  
7 those witnesses, of all witnesses, to be by declaration.

8 MR. O'ROURKE: Your Honor, just to clarify. We've  
9 already submitted from plaintiffs and counterdefendants the  
10 direct testimony of all witnesses except ones who are  
11 adverse or hostile.

12 THE COURT: Yes, all right.

13 (Proceedings concluded.)

14

15 REPORTER'S CERTIFICATE

16

17 I CERTIFY THAT THE FOREGOING IS A CORRECT  
18 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS  
19 IN THE ABOVE-ENTITLED MATTER.

20

21 \_\_\_\_\_ October 5, 2000 \_\_\_\_\_

22 LEONORE A. LeBLANC  
23 Official Reporter

24

25